

ORIGINAL

37/30

FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER 28 U.S.C. SECTION 2241

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

CA05-188E

CASE NO. _____ (to be supplied by the Clerk of Court)

ROBERT EARTHMAN, PETITIONER
(Full name -- include name under which you were convicted)

v.

JAMES F SHERMAN, RESPONDENT
(Name of Warden, Superintendent, Jailer, or authorized person having custody of petitioner)

ROBERT EARTHMAN #62089-061
NAME AND PRISON NUMBER

FEDERAL CORRECTIONAL INSTITUTION MCKEAN (CAMP)
PLACE OF CONFINEMENT

(If the petitioner wishes to attack a federal judgment under which a sentence was imposed he/she should file a motion under 28 U.S.C. Section 2255, in the federal court which entered the judgment).

PETITION FOR WRIT OF HABEAS CORPUS UNDER SECTION 2241
BY A PERSON IN FEDERAL CUSTODY

INSTRUCTIONS--READ CAREFULLY

1. This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question type or use lined paper.
2. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
3. Upon receipt of a fee of \$5.00 your petition will be filed if it is in proper order.

4. If you do not have the necessary filing fee, you may submit an application to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. You must also have an authorized official at the correctional facility complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds \$150.00, you must pay the filing fee as required by the rule of the district court.
5. Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or different states, you must file separate petitions as to each court.
6. Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
7. When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is:
8. Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under which you are presently confined:
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF OHIO, EASTERN DIVISION
2. Date of judgment of conviction: JANUARY 19, 1990
3. Length of sentence: 300 MONTHS Sentencing Judge: JAMES L. GRAHAM
4. Nature of offense or offenses for which you were convicted:
Count 1 -- 21 U.S.C. § 846, Count 2 -- 21 U.S.C. § 841(a)(1),
Count 4 -- 18 U.S.C. § 924(c), Count 6 -- 21 U.S.C. 841(a)(1) and
§ 845(a), Count 7 -- § 856(a)(2)

5. Were you sentenced on one or more than one count of an indictment, or on more than one indictment, in the same court and at the same time? YES (x) NO ().

6. Do you have any further sentence to serve after you complete the sentence imposed by the judgment under attack? YES () NO (x).

(a) If so, give name and location of court which imposed sentence to be served in the future:

N/A

(b) And give date and length of sentence to be served in the future:

N/A

(c) Have you filed, or do you contemplate filing, a petition attacking the judgment which imposed the sentence to be served in the future? YES () NO (x).

7. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground:

(a) Ground one:

WHETHER THE B.O.P. ERRED IN "PRESUMING" THAT THE PETITIONER'S
SENTENCE WAS ENHANCED UNDER 2D1.1 AFTER HIS 924(C) CHARGE
WAS DISMISSED?

Supporting **FACTS** (Tell your story briefly without citing cases or law):

In the case at hand, the B.O.P. argues that the Petitioner should
be denied the eligibility of reduction of his sentence under
3621(e)(2)(B) and this is because it is "presumed" the Petitioner
received a two-point enhancement under 2D1.1.

The Petitioner argues that the B.O.P.'s presumption is incorrect
as a matter of fact and therefore, this Honorable Court should
correct the B.O.P.'s finding and Order the relief sought.
See -- Memorandum In Support

[illegible]

I declare under penalty of perjury that the foregoing is true and correct.

(Signature of Attorney (if any))

CERTIFICATE OF SERVICE

I hereby certify that I have sent the original and two copies of this petition to the Clerk of Court at (address) P.O. Box 1805
Pittsburg, PA 15230, by U.S. mail with the correct postage paid.

Robert Earthman

Robert Earthman

Reg. No.: 62089-561

(prison) FCI MCKEAN Camp

(address) P.O. Box 8000

(city, state, zip) BRADFORD, PA 16701

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Robert Earthman, (Prisoner)

Petitioner

vs.

JAMES F. SHERMAN, (Warden)

Respondent

Case No.: _____

Judge: _____

PETITION FOR WRIT OF HABEAS
CORPUS UNDER SECTION 28 U.S.C.
2241, BY A PERSON IN FEDERAL
CUSTODY

MOTION AND MEMORANDUM IN SUPPORT OF 28 U.S.C. § 2241

Now comes the Petitioner, Robert Earthman, pro-se, to move this Honorable Court pursuant to 28 U.S.C. § 2241 to vacate and set aside the B.O.P. judgement denying him eligibility for the reduction of his sentence pursuant to Title 18 U.S.C. § 3621(e)(2)(B). The Petitioner states, that the B.O.P. incorrectly applied it's policy program statement of 5162.04, which was used by the B.O.P. to deny him eligibility for early release. Therefore, this error should be corrected in the interest of justice. (See Memorandum in support).

Respectfully Submitted,

Robert Earthman

Robert Earthman

MEMORANDUM IN SUPPORT(a)
JURISDICTION DISCUSSION

This Court has jurisdiction to hear this petition. A petition for writ of habeas corpus filed by a federal inmate under 28 U.S.C. § 2241 is proper where the inmate is challenging the manner in which his or her sentence is being executed. See -- Capaldi vs. Pontesso, 135 F.3d 1122, 1123 (6th Cir.1998); Downey vs. Crabtree, 100 F.3d 662, 664 (9th Cir.1996); Roussos vs. Meniffee, 122 F.3d 159, 161, N.3 (3rd Cir.1997) (district court jurisdiction under § 2241 and 28 U.S.C. § 1331). See also, Fuller vs. Moore, 133 F.3d 914 (4th Cir.1997); Venegas vs. Henman, 126 F.3d 760, 761 (5th Cir. 1997); Pearson vs. Helman, 103 F.3d 133 (7th Cir.1996); Sesler vs. Pitzer, 110 F.3d 569 (8th Cir.1997); and Byrd vs. Hasty, 142 F.3d 1395, 1396 (11th Cir.1998).

A district court has jurisdiction over a federal prisoner's habeas corpus petition challenging the determination by the B.O.P. that he or she is ineligible for a sentence reduction under 18 U.S.C. § 3621(e)(2)(B). See -- Scroger vs. Booker, 39 F.Supp.2d 1296, 1299 (D.Kan.1999), and Perez vs. Hemingway, 157 F.Supp.2d 790, 793 (E.D.Mich.2001).

In addition, this Court has subject matter jurisdiction over this petition, even if the Petitioner "did or did not" exhaust his administrative remedies prior to seeking habeas relief, because exhaustion of administrative remedies is not required by statute -- it is jurisdictional. See -- Brown vs. Rison, 895 F.2d 533, 535 (4th Cir.1990). Any additional exhaustion of Administrative

remedies by Petitioner in this matter is not required to confer subject matter jurisdiction by this Court over Petitioner's § 2241 petition, because the explicit exhaustion requirements which are contained in the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Prison Litigation Reform Act (PLRA) do not apply to habeas petitions filed under 28 U.S.C. 2241. See United States vs. West, 2003 WL1119990, 2 (E.D.Mich.Feb. 20, 2003); Hicks vs. Hood, 203 F.Supp.2d 379, 382 (D.Or. 2002). Additionally, in light of the fact that program statement 5162.04 is mandatory in nature and automatically excludes from early release all inmates who have violated 18 U.S.C. § 841 and who have received two-level sentencing enhancement under the sentencing guidelines for possession of firearm, any further exhaustion on Petitioner's part would be futile and will thus be excused. See, e.g. Boucher vs. Lamanna, 90 F.Supp.-2d 883, 887-88 (N.D.Ohio 2000); Camper vs. Benov, 966 F.Supp. 951 (C.D.Cal. 1997).

In 1994, Congress passed the Violent Crime and Control Act of 1994 ("ACT"). Part of the ACT directed the B.O.P. to make appropriate substance abuse treatment available for each prisoner the Bureau determines has a treatable condition of substance abuse or addition. See -- 18 U.S.C. 3621(b).

As an incentive to get inmates to participate in these programs, Congress provided that:

"[t]he period a prisoner convicted of a non-violent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must

otherwise serve.

18 U.S.C. § 3621(e)(2)(B).

Thereafter, on October 9, 1997, the Bureau of Prisons adopted a revised 28 C.F.R. 550.58. The revised regulation abandoned its earlier incorporation of the "crime-of-violence" definition in 18 U.S.C. § 924(c)(3), and adopted new criteria for determining an inmate's eligibility for early release for participation in a drug treatment program. See -- 28 C.F.R. 550.58(a)(1)(vi)(B)(indicates that inmates whose current offense was a felony which involved "his carrying, possession, or use of a firearm, or other dangerous weapons or explosives" were not eligible for early release under § 3621(e)(2)(B). 28 C.F.R. 550.58 was made immediately effective on October 9, 1997, although it was not published in the Federal Register until October 15, 1997.

To aid B.O.P. staff in understanding and implementing these amendments to section 550.58, the B.O.P. issued program statement 5162.04, "Categorization of Offenses", effective October 9, 1997. Section 2 of P.S. 5162.04 provides that "[A]n inmate will be denied the benefits of certain programs if his or her offense is either a crime of violence or an offense identified at the discretion of the Director of the Bureau of Prisons." Section 7 of P.S. 5162.04 further provides that B.O.P. staff must look at "sentence enhancement factors", such as possession of a firearm, which would subject a defendant to sentence enhancement under 2D1.1 and 2D1.11 of the Federal Sentencing Guidelines.

(b)
STATEMENT OF FACTS

On January 19, 1990, the Petitioner was sentenced to 300 months for the offenses charged. In this matter, the Petitioner received 240 months under Counts 1, 2, 6, and 7, and 60 months for Count 4, for a total of 300 months.

Thereafter, on May 1, 1997, the Petitioner filed a petition pursuant to 28 U.S.C. § 2255. On March 9, 1998, the Honorable Judge Graham granted the habeas corpus petition and vacated the sentence imposed in criminal case number CR-2-89-162 on count 4 of the superseding indictment. The sentence imposed on Counts 1, 2, 6, and 7 remain in full effect. See -- Exhibit B, Docket Sheet; and Exhibit C, judgement of § 2255. In this matter, there was no resentencing for enhancement purposes.

(c)
ARGUMENT ONE

WHETHER THE B.O.P. ERRED IN PRESUMING THAT THE
 PETITIONER'S SENTENCE WAS ENHANCED UNDER 2D1.1
 AFTER HIS 924(c) CHARGE WAS DISMISSED

In the case at hand, the B.O.P. argues that the Petitioner should be denied eligibility for early release and this is because:

"Ineligible for early release under 3621(e) due to the following reason(s); 18 U.S.C. 924(c) vacated based on Court Order, however, the enhancement is "presumed" per P.S. 5162.04."

See -- Exhibit A

Now in objection to the B.O.P. findings, the Petitioner argues that it cannot be "presumed" that his sentence was enhanced under

2D1.1 for possession of a dangerous weapon during the commission of a drug offense. In this matter, a review of his judgement vacating his 18 U.S.C. § 924(c) charge, which enhanced his sentence from 20 (twenty) years to 25 (twenty-five) years imprisonment, does not reflect any enhancement after the vacating of his 924(c) charge, which left the Petitioner with 20 (twenty) years remaining to serve. See -- Exhibit C, copy of the judgement.

The Petitioner argues that there is no reasonable basis for the B.O.P.'s assumption that his sentence was enhanced under 2D1.1, where the record in this case reflects that the Petitioner's sentence remained the same 240 months under Counts 1, 2, 6, and 7. See -- Exhibits B and C.

Clearly, based on the above undisputed facts, and the fact that no where in the B.O.P. Policy Statement 5162.04 does it state an enhancement can be "presumed" to deny the eligibility for early release, this Honorable Court should grant the relief sought.

Respectfully Submitted,



Robert Earthman

CERTIFICATE OF SERVICE

I hereby certify that I have sent the original and two copies of this petition to the Clerk of Court at (address) P.O. Box 1805
Pittsburg, PA. 15230, by U.S. mail with the correct postage paid.

Robert Earthman

Robert Earthman

Reg. No.: 62089-061

(prison) FBI MCKEAN CAMP

(address) P.O. Box 8000

(city, state, zip) BRADFORD, PA 16701

E X H I B I T " A "

PS 5330.10
CN-03 October 09, 1996
Attachment J, Page 1

**NOTICE OF RESIDENTIAL DRUG ABUSE PROGRAM QUALIFICATION
AND PROVISIONAL § 3621(E) ELIGIBILITY**

TO: Earthman, Robert REG NO: 62089-061
FROM: A. Enoch-Morris, Ph.D. INSTITUTION: FCI, Elkton
TITLE: DAP Coordinator DATE: March 8, 2004

SECTION 1 - RESIDENTIAL DRUG ABUSE PROGRAM QUALIFICATION

YOU HAVE REQUESTED PARTICIPATION IN THE BUREAU'S RESIDENTIAL*DRUG ABUSE TREATMENT PROGRAM. MY REVIEW OF YOUR CASE INDICATES THAT YOU DO / DO NOT MEET THE ADMISSION'S CRITERIA FOR THE RESIDENTIAL DRUG ABUSE PROGRAM. IT APPEARS THAT YOU DO / DO NOT QUALIFY TO PARTICIPATE IN THE RESIDENTIAL PROGRAM. (IF THE INMATE IS FOUND TO NOT QUALIFY, STATE THE REASON(S) BELOW).

Comments: _____

SECTION 2 - PROVISIONAL § 3621(E) ELIGIBILITY - TO BE COMPLETED ONLY IF THE INMATE HAS COMPLETED OR QUALIFIES FOR THE RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM.

FOR RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM GRADUATES TO BE ELIGIBLE FOR EARLY RELEASE, THEY MUST (DAPC must initial):

AEM

NOT BE AN INS DETAINEE.

AEM

NOT BE A PRE-TRIAL INMATE.

AEM

NOT BE A CONTRACTUAL BOARDER.

AEM

NOT BE AN "OLD LAW" INMATE.

NOT HAVE A CURRENT CRIME THAT IS AN EXCLUDING OFFENSE IN BOP CATEGORIZATION OF OFFENSES POLICY (Mark an 'X' in the appropriate block below).

AEM

NOT A CRIME OF VIOLENCE AS CONTAINED IN BOP CATEGORIZATION OF OFFENSES POLICY.

NOT AN EXCLUDING CRIME BY THE DIRECTOR'S DISCRETION IN CATEGORIZATION OF OFFENSES POLICY

AEM

NOT HAVE ANY PRIOR FELONY OR MISDEMEANOR ADULT CONVICTION FOR HOMICIDE, FORCIBLE RAPE, ROBBERY, AGGRAVATED ASSAULT, OR SEXUAL ABUSE OF CHILDREN.

AEM

UNDERSTAND THAT NEARING THE TIME OF YOUR RELEASE, THE WARDEN WILL DETERMINE IF YOU ARE ELIGIBLE FOR TRANSFER TO A COMMUNITY-BASED PROGRAM. IF YOU ARE NOT ELIGIBLE, YOU CANNOT COMPLETE THE COMMUNITY TRANSITIONAL SERVICES PORTION OF THE DRUG PROGRAM, AND THEREFORE, YOU MAY NOT RECEIVE A § 3621 (e) RELEASE.

MY CURRENT ASSESSMENT, IN CONSULTATION WITH YOUR UNIT TEAM, IS THAT IT DOES / DOES NOT APPEAR THAT YOU ARE PROVISIONALLY ELIGIBLE FOR AN EARLY RELEASE. IF NOT, LIST **ALL** THE REASON(S):

* Comments: Ineligible for early release under 3621(e) due to the following reason(s):
18 USC 924(c) vacated based on court order, however, the enhancement is presumed per
P.S. 5162.04.

IF APPLICABLE, I UNDERSTAND THAT A DETERMINATION OF EARLY RELEASE FOR ME IS PROVISIONAL, MAY CHANGE, AND DEPENDS ON CONTINUED POSITIVE BEHAVIOR AND SUCCESSFUL PARTICIPATION IN ALL COMPONENTS OF THE PROGRAM, INCLUDING COMMUNITY TRANSITIONAL SERVICES.

INMATE'S SIGNATURE Earthman, Robert
(indicate if refused to sign)

Administrative Remedy No. 340482-A2
Part B - Response

You contend you have wrongly been denied eligibility for early release pursuant to 18 U.S.C. § 3621(e) for successful completion of the Residential Drug Abuse Program (RDAP). You request to be deemed eligible for early release.

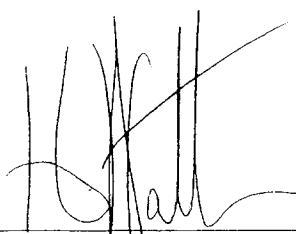

Our review of this matter reveals that both the Warden and the Regional Director have adequately addressed your concerns. Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, provides in Section 6.1.1 that "as an exercise of the discretion vested in the Director of the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release...inmates whose current offense is a felony...that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives..."

Program Statement 5162.04, Categorization of Offenses, provides in Section 7(b) that "in some cases, an inmate may be convicted of an offense listed in this section as well as 18 U.S.C. § 924(c)(1), use of a firearm during a crime of violence or drug trafficking crime. According to the U.S. Sentencing Guidelines, if a defendant receives a § 924(c)(1) conviction, the court may not assess a two-level "Specific Offense Characteristic" enhancement for possession of a firearm; however, in light of the Supreme Court ruling in *Bailey v. U.S.*, 116 S.Ct. 501 (1995), a number of § 924(c)(1) convictions have been vacated. In *Bailey*, the Court held that the term "use" connotes an active employment of the firearm. If any of the offenses listed in this section were accompanied by a § 924(c)(1) conviction that was subsequently vacated due to the *Bailey* decision, staff shall presume that the inmate would have received a two-level "Specific Offense Characteristic" enhancement for possession of a firearm unless there is a specific court order to the contrary. Thus, absent a court order specifically denying the application of a two point enhancement for possession of a firearm, the inmate will not receive certain Bureau program benefits."

Inasmuch as there is no order denying the application of the presumptive enhancement, you remain ineligible for early release. The court's reasoning for not considering your request for such an order is irrelevant.

Your appeal is denied.

January 5, 2005
Date


Harrell Watts, Administrator
National Inmate Appeals 

EARTHMAN, Robert Eugene

Reg. No. 62089-061

Appeal No. 340482-R1

Page One

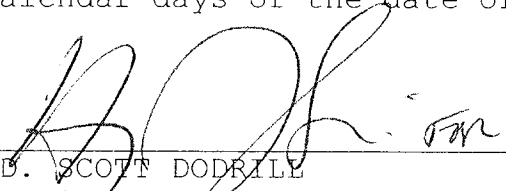
Part B - Response

In your appeal, you appeal the decision of the Warden at FCI Allenwood advising you are ineligible for early release upon successful completion of the 500-hour Residential Drug Abuse Program.

As indicated by the Warden, your case was thoroughly reviewed for early release consideration after your 18 U.S.C. 924(c) conviction was vacated. We concur that there is sufficient evidence that your federal offense involved the use of a firearm. Program Statement 5330.10, Inmate Drug Abuse Programs Manual, Chapter 6, Page 1, and 28 C.F.R. § 550.58 provide that an inmate whose current offense involved the carrying, possession of use of a firearm is not eligible for early release under § 3621(e). We concur with the Warden's response and you are ineligible for early release under 18 U.S.C. § 3621(e). Accordingly, your appeal is denied.

If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons. Your appeal must be received in the Administrative Remedy Section, Office of General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C. 20534, within 30 calendar days of the date of this response.

Date: August 19, 2004


D. SCOTT DODRILL
Regional Director



UNITED STATES GOVERNMENT

Department of Justice
Low Security Correctional Institution
Allenwood Federal Correctional Complex
White Deer, PA 17887

REQUEST FOR ADMINISTRATIVE REMEDY
PART B - RESPONSE

EARTHMAN, ROBERT E.
REG. NO.: 62089-061
REMEDY ID: 340482-F1

This is in response to your Request for Administrative Remedy dated July 1, 2004, wherein you reported that you applied to the Residential Drug Abuse Program (RDAP) and were deemed eligible for an RDAP admission; however, you were found ineligible for a 3621(e) early release. You are requesting that you be considered eligible for a 3621(e) early release should you successfully complete the RDAP.

In explaining the history of how RDAP staff found you to be 3621(e) ineligible, you wrote that for your instant offense, you were convicted as a career offender and, although your 924(c) conviction was vacated, you did not receive a two-point enhancement for possession of the firearms during the commission of your instant offense. You added that: "Under the program statement 5162.04 (page 12)...staff shall take it for granted that (since your) gun charge has been vacated and a two-level enhancement wasn't applied, it is to be presumed that (the enhancement will now apply because there is no) specific court order to the contrary." You attached a copy of the "Government's Response to Request of Defendant for Court Order Denying the Application of a Two-Point Enhancement for Possession of a Firearm," which for you was an unfavorable reply from the Court on this matter. However, within the text of that response, the United States Attorney wrote that, although the Court is not in a position to specifically deny the application of a two-point enhancement, perhaps the Court could issue an order clarifying its previous intent, which may satisfy the Bureau of Prisons. Despite this recommendation from the U.S. Attorney, you are now requesting that you be deemed eligible for a 3621(e) early release.

Your record has been fully reviewed and the DAP Coordinator confirmed that your 924(c) charge has been vacated. Your file also has a copy of the Northeast Regional Assistant Counsel's recommendation for action in this regard. That recommendation reads that, although your case predates the relevant Supreme Court Bailey decision, the conditions are the same and the Bureau of Prisons should act in accordance with the Bailey finding. This decision is neither intended to discourage or encourage your further communication with the Court, so as to clarify the Court's past intent.

Your Request for Administrative Remedy is therefore denied. At this time you remain eligible for RDAP admission, but ineligible for a 3621(e) early release. If you are dissatisfied with the above findings, you may submit a Regional Appeal via Form BP-230(13) to the Northeast Regional Director within twenty calendar days from the date of this response.

07-06-04

Date

Craig Apker, Warden

E X H I B I T " B "

CLOSED

**U.S. District Court
 Southern District of Ohio (Columbus)
 CIVIL DOCKET FOR CASE #: 2:97-cv-00519-JLG-MRA
 Internal Use Only**

USA v. Earthman
 Assigned to: James L Graham
 Referred to: Mag. Judge Mark R. Abel
 Demand: \$0
 Case in other court: JLG, CR-2-89-00162-1
 Cause: 28:2255 Motion to Vacate / Correct Illegal Sentenc

Date Filed: 05/01/1997
 Jury Demand: None
 Nature of Suit: 510 Prisoner: Vacate
 Sentence
 Jurisdiction: U.S. Government
 Defendant

Plaintiff

USA

V.

Defendant

Robert Earthman

represented by **Aaron Peter Buda**
 6310 E Kemper Rd, Suite 125B
 Cincinnati, OH 45241
 247-5366
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
05/01/1997		PETITION FOR WRIT OF HABEAS CORPUS (referred to Mag. Judge Mark R. Abel) () (bw) (Entered: 05/02/1997)
05/01/1997		NOTICE of appearance of attorney for defendant () (bw) (Entered: 05/02/1997)
05/01/1997		ORDER by Mag. Judge Mark R. Abel USA has 20 days to answer the complaint. (cc: all counsel) () (bw) (Entered: 05/02/1997)
05/08/1997		MOTION by defendant for leave to supplement the 2255 petition () (bw) (Entered: 05/09/1997)
05/21/1997		RESPONSE by plaintiff to the 2255 (bw) (Entered: 05/22/1997)
03/09/1998		ORDER by Judge James L. Graham granting habeas corpus petition [0-1] and vacating the sentence imposed in CR-2-89-162 on Count 4 of the superseding indictment. The sentence imposed on Counts 1, 2, 6 and 7 remain in full effect. Defts sentence of 240 months imprisonment imposed for those counts remains in full force and effect. The 60 month sentence on Count 4 consecutively to the terms imposed on counts 1,2,6

		and 7 is Vacated. (bw) (Entered: 03/09/1998)
03/27/1998		Docket Modification (Utility Event) finding the motion for leave to supplement the 2255 petition [0-1] moot. (bw) (Entered: 03/27/1998)
03/27/1998		Docket Modification dismissing case (bw) (Entered: 03/27/1998)

E X H I B I T " C "

ack
copy
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAR 09 1998

KENNETH J. MURPHY, Clerk
COLUMBUS, OHIO

Robert Earthman,

:

Petitioner

:

Case No. C-2-97-519
(Crim. No. CR-2-89-162)

v.

:

Judge Graham

United States of America,

:

Magistrate Judge Abner

Respondent

:

ORDER

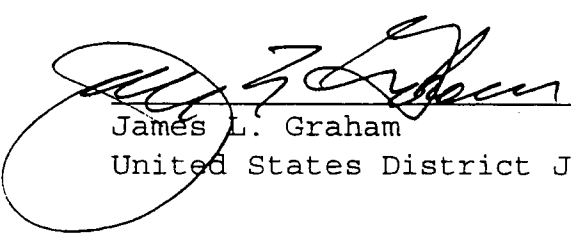
I CERTIFY THAT THIS IS A
TRUE AND CORRECT COPY OF THE
ORIGINAL FILED IN MY OFFICE
ON March 9, 1998
KENNETH J. MURPHY, CLERK
BY B. White
Deputy Clerk
DATE: 3-9-98

Petitioner Robert Earthman has filed a motion to vacate conviction and sentence pursuant to 28 U.S.C. §2255. In its response to the motion, the United States of America agrees that the Court should vacate the judgment of conviction entered on Count 4 of the superseding indictment, knowingly carrying a firearm, in violation of 18 U.S.C. §924(c).

The United States agrees that the firearms found inside Robert Earthman's residence at the time the search warrant was executed were not immediately accessible to him and were not transported by him during the underlying drug offenses, both of which are requirements to sustain a conviction under §924(c). United States

v. Riascos Suarez, 73 F.3d 616, 623 (6th Cir. 1996); *United States v. Moore*, 76 F.3d 111 (6th Cir. 1996).

Accordingly, petitioner Robert Earthman's motion to vacate sentence is GRANTED. The judgment of conviction entered on Count 4 of the superseding indictment is VACATED. The sentences imposed on Count 1 (conspiracy to possess cocaine in violation of 21 U.S.C. §846), Count 2 (possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1)), Count 6 (possession of cocaine with intent to distribute within 1,000 feet of an elementary school in violation of 21 U.S.C. §§841(a)(1) and 845(a)), and Count 7 (control of property for the purpose of storing crack cocaine in violation of 21 U.S.C. §856(a)(2) and 18 U.S.C. §2) remain in full force and effect. Further, the sentence of 240 months' imprisonment imposed as a sentence for those counts remains in full force and effect. The 60-month sentence imposed on Count 4 to be served consecutively to the terms imposed on Counts 1, 2, 6, and 7 is VACATED.



James L. Graham
United States District Judge